

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BARDON, INC., D/B/A
AGGREGATE INDUSTRIES

and

Case No. 05-CA-248026

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS, IRON SHIP
BUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO, CLC

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for the Charging Party.*

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case remotely using videoconferencing technology on January 11 to 15, and 25, 2021. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, CLC (Charging Party or Union) filed the charge on September 12, 2019, and the amended charge on December 11, 2019. The Director for Region 5 of the National Labor Relations Board (the Board) issued the consolidated complaint and notice of hearing (the complaint) on May 1, 2020. The allegations concern the period immediately surrounding a representation election in which employees voted to be represented by the Charging Party. The complaint alleges that Bardon, Inc., d/b/a Aggregate Industries (the Respondent or the Employer): violated Section 8(a)(1) of the National Labor Relations Act (Act or NLRA) by creating the impression that employees' union activities were under surveillance, threatening employees with unspecified reprisals if they

selected the Union as their bargaining representative, coercively interrogating employees about union views and activities, and, shortly before the hearing in this matter, improperly interrogating employees about the union memberships, activities, and sympathies of themselves and other employees.¹ The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily terminating Jose Molina, Moris Alberto, and Thomas Johns in the immediate aftermath of the union election. The Respondent denies committing any of the violations alleged.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Millville, West Virginia, that manufactures and sells aggregate construction materials. In conducting these business operations, the Respondent annually sells and ships from the Millville facility goods valued in excess of \$50,000 directly to points outside the State of West Virginia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

¹ At trial I granted the General Counsel's motion to amend the complaint to add the last of these allegations. Transcript at Page(s) (Tr.) 1118. The amendment supplements the complaint with the following paragraphs:

4(c) At all material times, two unnamed agents have held the position of Respondent's counsel and have been agents of Respondent within the meaning of Section 2(13) of the Act.

7(b) On or about January 12, 2021, Respondent by the two unnamed agents and/or Pat Lane, by tele/videoconference, interrogated its employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees at Respondent's facility.

Administrative Law Judge Exhibit (ALJ Exh.) 1.

² Two motions to correct the transcript were filed on March 24, 2021. One motion was filed jointly by all parties and that motion is hereby granted and received in evidence as ALJ Exh. 2. The other motion was filed by the General Counsel and the Charging Party. The Respondent opposed this motion, but neither asserted that the transcript portions identified in it were already accurate nor suggested alternative corrections. I find that a ruling on the latter motion would not alter my findings of fact and therefore the motion is denied as moot. The opposed motion is received in evidence as ALJ Exh. 3 and the Respondent's opposition is received as ALJ Exh. 4.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

5 The Respondent, a division of Lafarge Holcim U.S., operates approximately 225 facilities in the United States. The allegations in this litigation involve one of those facilities – the Respondent’s quarry facility in Millville, West Virginia, where it mines, crushes and sizes rock. The Millville facility employs approximately 50 individuals, of whom 37 are hourly employees. The facility complex covers several acres and includes
10 30 conveyor belts that are used to move material around the facility. These conveyor belts are up to 300 feet in length and the machinery that drives them is powerful enough to create a risk of serious, potentially fatal, injuries.

15 Prior to 2019, there had been multiple unsuccessful efforts to organize a union among the Respondent’s hourly employees at the Millville facility.³ On June 5, 2019, the Union filed another petition to represent hourly employees at the facility. A representation election was held on June 27, 2019, and a tally of ballots prepared that day showed that this time the employees had voted to be represented by the Union. The very next day, the Respondent began to investigate a possible safety violation by
20 Jose “Joe” Molina, the leading union advocate at the facility. The day after that, June 29, the Respondent suspended Molina. The reason given for the suspension was that the Respondent was investigating whether Molina had, while repairing a conveyor belt on July 28, bypassed safety protocols. On July 12, 2021, after completing its investigation of the incident, the Respondent terminated Molina, as well as two other
25 employees, Moris Alberto and Thomas Johns, who had also been involved in making the repair.

30 The terminated employees all worked on the Millville’s facility’s 2nd shift, which runs from 2 pm to 10 pm. Curtis Mills was the supervisor who gathered the photographic evidence and made the report that instigated the disciplinary process that culminated with their terminations. Curtis Mills⁴ was the only supervisor on the 2nd shift during the relevant time period. He had been a supervisor at the Millville facility for 15 years and worked there in various capacities for 35 years. The highest ranking official at the Millville facility was plant manager Andrew Wright, who had been with the
35 Respondent only since February 2019, and had taken the position of plant manager in April 2019 – 2 to 3 months before the representation election and repair incident that are at issue here.

³ Although the Respondent’s employees at the Millville facility had never previously been represented by a union, a number of the Respondent’s workers at other facilities were union-represented. The Respondent’s corporate parent, Lafarge Holcim U.S., is party to 80 collective bargaining agreements at its approximately 300 locations nationwide, including 3 to 6 with the Charging Party. The Respondent’s mid-Atlantic region (which includes the Millville quarry), has about 40 facilities, Tr. 910, at five of which employees are represented by a union, Tr. 713-714.

⁴ I refer to Curtis Mills using both his first and last name throughout this decision to distinguish him from another worker at the Millville facility, C.W. Mills, who is Curtis Mills’ son.

B. UNION CAMPAIGN AND EMPLOYER RESPONSE

5 During the 2019 union campaign, Molina distributed pronoun literature and union authorization cards to co-workers. He collected the majority of the union cards signed by employees. He invited co-workers to offsite union meetings and displayed union stickers on the truck that he parked in a lot used by both employees and supervisors. On the day of the election, Molina was one of the two designated election observers for the Union. It is fair, based on these activities and the record as a whole, to characterize Molina as the leader of the employees' effort to unionize.

15 On June 5, 2019, Pat Lane, the director of labor relations for the Lafarge Holcim U.S. operation, was notified that the Union had filed a petition to represent employees at the Millville facility. The next day, and again on June 7, Lane met with managers and supervisors, including Curtis Mills, to talk about the employer's response to the petition. Officials of the Respondent, including Wright, James Bottom (the regional operations manager to whom Wright reported), and Terri Collins (regional human resources manager) held meetings at the facility with groups of employees to advocate against unionizing. Most of the Respondent's antiunion campaign, however, took the form of managers holding one-on-one meetings with employees. Lane (the director of labor relations for the entire, 300-facility, Lafarge Holcim U.S. enterprise) met individually with 30 of the Millville employees and urged them to "consider supporting the Company." He testified that while he "really wasn't expecting an answer" to "that question," some employees stated how they intended to vote and that those who did said that they would vote against unionizing. Tr. 1080-1081. Bottom, regional operations manager, also met with employees one-on-one to campaign against the Union. Bottom was not based at the Millville facility, managed a region with over 40 facilities, and, according to Alberto, "never show[e]d up" at Millville unless "something was wrong." Tr. 588. Among those Bottom met with were Molina, Alberto, and Johns. Wright, plant manager, met separately with each one of the approximately 37 hourly employees in order to campaign against unionization, and generally did so two or three times with each employee. Tr.76-77. During one of these conversations, Wright asked Molina to give him "a chance," and Molina responded by complaining about Curtis Mills' conduct as a supervisor. Molina told Wright that Curtis Mills showed unfair favoritism and required employees to perform tasks in an unsafe manner. After this conversation, and prior to the representation election, Wright told Curtis Mills about Molina's criticisms of him. Tr. 194-195, 1180-1181. During the union campaign, Molina also expressed his complaints about Curtis Mills to Collins. Tr. 738-739.

40 The General Counsel contends that Curtis Mills and Bottom both made unlawfully coercive statements to employees in advance of the June 27 representation election. Regarding Curtis Mills, there was testimony from three employees that Curtis Mills told them he knew that the second shift employees were behind the union campaign. Employee Timothy Rutherford, a union steward, testified that a few weeks before the election, he had a conversation with Curtis Mills at the workplace and that Curtis Mills stated that he heard a rumor that the Union was trying to come in and that

Molina was the “troublemaker” who was “trying to bring [the Union] in.” Tr. 309. Alberto testified that, during two separate workplace conversations, Curtis Mills told him that the “office” knew the 2nd shift was the “troublemaker” and was “carrying the train” for the Union. Tr. 591-592, 593-594. Molina, who Alberto testified was present for one of these conversations, corroborated Alberto’s account. Specifically, Molina testified that Curtis Mills stated to Alberto and himself that the “2nd shift was involved with the union activities, and . . . was the one pulling the train.” Tr. 193. Johns testified that Curtis Mills mentioned the Union to him, but only to say “I hear rumors about a union possibly coming in.” Tr. 493.

Curtis Mills appeared as a witness and testified that he had never told employees that the 2nd shift employees – or Molina, Alberto, and Johns in particular – were actively supporting the Union or were troublemakers. Tr. 932. Indeed, Curtis Mills went further than that and testified that he had never discussed rumors of unionization with employees. Tr. 928-929.

On balance, I find that the employees’ testimonies regarding Curtis Mills’ statements to them about the Union are more credible than his denials. In particular, I find that the testimony that Curtis Mills stated that 2nd shift employees, and Molina in particular, were the troublemakers behind the union effort was more credible than Curtis Mills’ denial that he made such statements. The testimonies of Molina, Alberto, and Rutherford on this point were clear, certain, and generally corroborative of one another, and were not shown to contain significant internal contradictions or other indicia of invention. On the other hand, there are multiple factors that call the reliability of Curtis Mills’ testimony into question. First, Curtis Mills himself testified that he had a medical condition that could cause him to “be incoherent or just not remember things.” Tr. 962. In addition, some of his testimony was contradicted not only by the General Counsel’s witnesses, but by other witnesses for the Respondent. For example, Curtis Mills claimed that he only found out about the representation petition during the week before the election, Tr. 928, but Lane testified that 3 weeks before the election he met with Curtis Mills to advise him and others about the petition, Tr. 1073. In addition, Curtis Mills’ denials were shown to be exaggerated. For example, as noted above, he testified that he had never discussed the unionization rumors with employees, but elsewhere in his testimony he admitted that he discussed the Union with employees when they asked about it, Tr. 931, and he did not directly contradict testimony that he asked employees what the Union could “do for” him. Tr. 592-593, 611. In addition, although I recognize that Alberto, like the other alleged discriminatees, has a financial stake in the outcome of this litigation, the record also indicates that he was a friend of Curtis Mills, Tr. 665.

The General Counsel also alleges that Curtis Mills threatened employees with unspecified reprisals if they voted to be represented by the Union. This allegation is based on the statements discussed immediately above, as well as on Curtis Mills’ statement, about a week before the election, that “he only had to be nice to [employees] for one more week,” and that employees better “watch out.” I find that Curtis Mills made the statement that he only had to be nice to employees for one more week. Rutherford testified in a confident and certain manner that Curtis Mills made this statement during a discussion about the Union, Tr. 379, and Curtis Mills’ conceded at trial that he “may

have” made the statement, Tr. 936. I find, however, that the evidence does not establish that Curtis Mills made the latter remark – i.e., that second shift employees better “watch out.” Alberto was the only witness who used the “watch out” language at trial, and his testimony on this subject was vague and is better understood in context not as an assertion that Curtis Mills actually used the phrase “watch out,” but rather as Alberto’s interpretation of Curtis Mills’ statement that he knew the second shift employees were behind the union campaign.⁵

As discussed earlier, Bottom met individually with the vast majority of bargaining unit employees at the Millville facility in June 2019 and urged them to vote against the Union. Bottom met one-on-one with Molina, Alberto, and Johns for between 15 minutes and 1 ½ hours each. Molina testified that during a meeting a few days before the election, Bottom asked him why employees wanted to vote for the Union. Tr.196-197. Alberto testified that Bottom had several meetings with him and that Bottom asked how he intended to vote. Tr. 589. According to Alberto, he responded that he had made a decision, but refrained from stating what his decision was. Johns testified that while he was operating a loader on the night before the election, Bottom entered the vehicle and accompanied him for a period that Johns estimated at 1 hour to 1 ½ hours. Tr. 498-499, 512, 1043. Johns testified that during this period Bottom asked him how he “felt about the Union” and whether he knew anybody in a Union. Tr. 499. Johns also recounted that during this conversation Bottom stated that the Union would take salary, vacation time, and retirement account funds from employees. Tr. 498.

Bottom denied that he ever asked the employees how they were going to vote. Tr. 1041. He testified, rather, that during the conversations regarding the union election he asked bargaining unit employees “how they were doing through the process” and whether they “had any questions,” and urged them to vote against unionizing. Tr. 1040-1041. On the subject of whether Bottom asked the employees how they planned to vote or whether they supported the Union, I found Bottom’s denials less credible than the contrary testimony discussed above. Bottom’s testimony regarding his interactions with employees during the one-on-one meetings were inconsistent and strained. For example, when asked whether he talked to employees about the Union election, he said “no, not the election,” and that he never discussed the “pros and cons” of voting one way or the other, but elsewhere in his testimony he conceded that he did “encourage them simply, you know, vote no,” for the reason that the Respondent “had a good plan” for the facility. Tr. 1041-1042. Bottom, while denying that he asked employees how they were going to vote, also stated that 75 percent of the employees he talked to about the union campaign volunteered that they would vote against unionizing. Tr. 1050. It is improbable to me that so high a percentage of employees would reveal their voting intentions to Bottom without even being asked.⁶ Moreover, there was no testimony by others to corroborate Bottom’s account of how he conducted the one-on-one

⁵ Alberto’s testimony was as follows: “[Curtis Mills] said that everybody in the office know second shift was carrying the train, like we’re the troublemakers and he said you all better like – *I’d say like* watch out and that’s it.” Tr. 593 (Emphasis Added).

⁶ Bottom stated that Molina also volunteered how he would vote, and that he was the only employee who stated that he would vote in favor of the Union. Tr. 1050.

conversations with employees – e.g., that he did not ask them how they were going to vote, but that they volunteered to him that they would vote “no.”

Employee C.W. Mills was the lead man for the 3rd shift⁷ and also the son of Curtis Mills. The night before the election, C.W. Mills was standing with Curtis Mills and Lane, and called Molina over. When Molina came over, C.W. Mills said, “why don’t you tell Pat Lane what you’re doing tomorrow.” Tr. 199-200. Molina responded, “I got asked to represent the Union tomorrow, and that’s what I’m going to do.” That day, Molina also told Wright that he would be the Union’s election observer. Tr. 78.

Regarding Alberto and Johns, the record does not establish that the Respondent would have been aware of any union activity or support on their parts. Alberto testified that he was in favor of unionizing and that he attended union meetings and distributed flyers, however, the record indicates that the Respondent, more likely than not, did not know this. Indeed, Alberto conceded that the belief around the facility was that he was antiunion. Tr. 664-665. Rutherford, a union election observer, union steward, and witness for the General Counsel, confirmed this, stating that his understanding during the campaign was that Alberto was antiunion. Alberto did not claim that he ever told any official of the Respondent that he was pronunion, and in fact both Lane and Wright testified that they remembered Alberto telling them during the campaign that he would not vote for the Union. Tr. 1080-1081, 1133.

Johns testified that he supported the Union, but the record indicates that this support was neither open nor active. He testified that when other workers expressed views about the Union in his presence, he would just “test the water” or go along with “how they were talking.” Tr. 493. Johns told both Wright and Bottom that his father was a long-time union member, but he did not state that he told either company official that he supported having a union at the Millville facility. Both Wright and Bottom testified that, to the contrary, Johns told them that he did not want to pay union dues and would vote *against* unionizing. Tr. 1042-1043, 1132. Johns stated that he did not recall saying that to Bottom, but he stopped short of unequivocally denying that he had done so. Tr. 565.

C. CONVEYOR BELT REPAIR ON JUNE 28 AND TERMINATIONS OF MOLINA, ALBERTO, AND JOHNS

By the end of the day on June 27, Curtis Mills, Wright, Lane, and others knew that the vote tally from that day’s election showed that the bargaining unit employees had voted to be represented by the Union. The following day, June 28, Molina and Alberto were the maintenance mechanics working on the 2nd shift. Both were long-term employees – Molina had worked at the Millville quarry for 16 years, and Alberto for 4 years. Those on duty also included Johns, a truck driver who had started with the Respondent about a year earlier. Curtis Mills instructed Molina and Alberto to track a belt. Tr. 940-942. Tracking belts is a routine repair that is necessary when a conveyor belt gets out-of-line, causing spillage of the material being moved. Molina has tracked

⁷ There was no supervisor on the 3rd shift at this time.

belts over a thousand times during his years at the facility. Alberto tracked belts 3 to 10 times a week. Tracking issues are addressed by trying a series of progressively more involved approaches. Generally, the effort begins by bumping or tapping the rollers along the length of the belt to straighten the path of the belt. If that does not remedy the issue, the maintenance mechanics will use a ratchet or an impact gun and try to steer the belt by turning the adjustment bolt on the "tail pulley" assembly that drives the belt. If it is not possible to turn those bolts or otherwise adequately adjust the belt using them, the mechanics remove metal safety guards that screen the tail pulley assembly and make a repair such as using a torch to loosen the adjustment bolt or cutting the bolt. Sometimes the repairs involve splicing a torn belt, changing the bearings on the conveyor, or taking the tail pulley apart.

When Molina and Alberto attempted to track the belt on June 28, they found that the less involved approaches were not meeting with success. Molina informed Curtis Mills that the repair would take longer than expected and would require that the employees "get in the tail section." Tr. 208, 946-947.

C.W. Mills, although his shift had not yet started, approached the area where Molina and Alberto were making the repair. C.W. Mills observed that one or more of the safety guards on the tail pulley were not in place. These guards create a cage around the mechanism that prevents employees from placing their hands within the area where the moving parts can cause injury. After C.W. Mills saw this, he went to the breaker room,⁸ and once there observed that the employees making the repair had not "locked out" the belt. The purpose of locking out is to de-energize the machine so that it cannot start moving while the employees are still working on it. The record shows that, depending on the circumstances, if a machine begins operating while employees are working on it the resulting injuries can be serious or even fatal.

Curtis Mills received a call from his son, C.W. Mills, advising him that Molina was working on the belt's tail pulley with the safety guards removed and without locking out. Curtis Mills did not go to the conveyor belt at that time to tell Molina to lock out the machine so as not to risk injury, but rather went to the breaker room and took a photograph, time-stamped at 9:04 pm, showing that the conveyor belt was not locked out. Then he drove a vehicle to the area where the work was being performed. Before leaving the vehicle or talking to the employees, Curtis Mills took another photograph, time stamped at 9:08 pm, showing Molina and Johns⁹ working on the tail pulley with two of the safety guards removed. Alberto, who had been working with Molina on the repair, is seen in the photograph, but not in the immediate area where the repair was being made. After Curtis Mills took this photograph, he approached the employees working on the belt. Molina and Alberto testified that, by this time, they had figured out that they would have to reach into the area where the guards usually were to make the repair, and so told Curtis Mills that they were going to go to the breaker room to lockout the

⁸ This room is referred to elsewhere in the record as the Motor Control Center, the Control Center, or MCC.

⁹ This work was outside the scope of Johns' regular duties as a truck driver, but he volunteered to assist Molina and Alberto for about 3 to 5 minutes.

belt. Curtis Mills testified that, to the contrary, Molina and Alberto did not want to lock out at this time, but he directed them to do so. Subsequent to this conversation, Molina and Alberto did go to the breaker room and locked out the belt before returning to complete the repair.

Curtis Mills discussed the matter with C.W. Mills, who then contacted Wright by text message to inform him about the incident. Tr. 832 and 1133. Wright responded that Curtis Mills should “handle” it. Tr. 1134. Curtis Mills subsequently called Wright, and also texted the previously created photographic evidence to Wright. Wright told Curtis Mills to “document everything.” Wright testified that Curtis Mills’ photographs showed that two guards had been removed from the tail pulley and he further testified that the Respondent’s policy “absolutely” required employees to lock out the machine in this circumstance. That day or the following day, Wright contacted his superior, regional operations manager Bottom, to discuss the lockout issues.

Before Molina, Alberto, and Johns left the facility at the end of their shift on June 28, no one notified them that they were being investigated for committing a safety violation or that discipline was being considered. The following morning, Wright contacted Molina and Johns by phone and told them that they were suspended pending investigation of a violation of the lockout rule. Wright also suspended Curtis Mills and C.W. Mills during the investigation. Wright testified that this was done because they were involved in the sense of being the persons who reported the incident. Wright did not initially suspend Alberto because the photographs and information that Curtis Mills had provided did not reveal Alberto’s involvement.

The Respondent conducted an investigation of the June 28 repair. The investigation was conducted at the local level by Wright, Jeffrey Harmon (regional manager for health and safety), and Terri Collins (regional human resources manager). Wright, Harmon, and Charl Marais (operations manager for Lafarge Holcim’s asphalt division)¹⁰ were present when the Respondent interviewed Molina, Alberto, and Johns. During the initial interviews it came to light that Alberto was another individual who had participated in making the at-issue repair. Alberto was then suspended and interviewed by the Respondent. After the first round of interviews, the local investigatory team made a report to a corporate review team/safety committee that included Lane, Collins, and three other corporate officials (the director of safety for Lafarge Holcim, the general manager for the Respondent’s mid-Atlantic region, and the Respondent’s in-house legal counsel). Tr. 852, 1083. Based on input from the corporate review team, the local investigatory team conducted a second round of interviews. Union steward Rutherford attended and made an audio recording of one of the interviews with Molina and one of the interviews with Johns. Alberto chose not to have Rutherford present when he was interviewed. Molina, Alberto, and Johns all stated during the investigative interviews that they did not believe it was necessary in practice to lockout as soon as they took the safety guards off, but rather that locking out only became necessary if they “broke the plane,” meaning that in addition to taking off the guards they actually needed to put their

¹⁰ Marais was brought in to substitute for Bottom, who Harmon testified was “a little too close to what was going on” regarding the Union. Tr. 843.

hands into the area that the guards usually kept them out of. Tr.132-133. The record indicates that it is possible for mechanics to remove the guards and use equipment – such as impact guns, torches, and ratchets – that affect mechanisms in the guarded area without “breaking the plane” with their hands.

After the interviews, the local team recommended to the corporate review team that Molina, Alberto, and Johns all be terminated. On July 10, the corporate review team made the decision to terminate all three employees. Collins came to the facility on July 12 and notified Molina, Alberto, and Johns that they were terminated effective immediately. Collins provided each with a termination letter, signed by her. All three termination letters included the following language:

The Company has taken this action because you violated the Company Safety Standards for Machine Guarding and Lock Out – Tag Out – Try Out (LOTOTO) when you removed guards from the M25 Conveyor Belt and were attempting to perform repairs without first locking out the equipment properly; thus placing you and others at risk for serious injury or death.

Respondent’s Exhibit Number(s) (R Exh.) 64, 65, 66. In the case of Johns, the termination letter included additional language, not contained in the letters for Molina and Alberto, stating that John’s termination was “additionally” based on the conclusion that Johns “provided false information during an investigation into the matter, which violates both our incident reporting protocols and our major work rules for honesty.” R Exh. 65.

After reviewing the testimony, recordings, and documentary evidence regarding the Respondent’s investigation, I find that the Respondent correctly concluded that Molina, Alberto, and Johns, had all worked on the belt’s tail pulley with the safety guards removed without first locking out the machine. The Respondent’s conclusion was convincingly supported by the time-stamped photographs showing the breaker room and the employees at the site of the repair. In addition, I find that based on its investigation, the Respondent correctly concluded that Johns had, during one of the investigatory interviews, falsely stated that he had not helped with the June 28 belt repair. In a later interview, and again under oath at the hearing, Johns conceded that he had initially made false statements regarding this to the Respondent.¹¹

¹¹ Counsel for the Respondent suggests in their posthearing brief that the terminations of Molina and Alberto are justified not only by the lockout violation, but also because they, like Johns, made knowingly false statements during the Respondent’s investigation. However, the record evidence does not demonstrate that the Respondent’s officials ever stated that Molina and Alberto made knowingly false statements. To the contrary, the Respondent’s termination letters to Molina and Alberto, unlike the one issued to Johns the same day, make no mention of such a determination. Collins, the human resources official who carried out the terminations, and participated in both the local investigation and the corporate review, confirmed that false statements were not cited by the Respondent as a basis for terminating Molina and Alberto. Tr. 759. Collins testified that, while making false statements during an investigation is a serious violation, such a violation would “not by itself” be a terminable offense. Ibid.

The record establishes that Molina had worked at the Millville since 2003, and had been a maintenance mechanic there since 2005. The Respondent had only disciplined Molina once before – approximately 10 years earlier when he refused a work assignment that interfered with his family obligations. Alberto had been working at the Millville facility for 4 years at the time he was terminated. He had previously received one disciplinary write-up for modifying his work schedule without permission. Tr. 618-619. Curtis Mills stated that both Molina and Alberto were “very good” workers, Tr. 926, and Molina testified that Curtis Mills used him to train other employees. Wright testified that Molina’s and Alberto’s disciplinary histories were not considered, or even reviewed, before the Respondent decided to terminate them. Tr. 106-107. Johns had been working for the Respondent for approximately 1 year at the time of his termination. He had previously received verbal warnings for “back talking” and for performing a task slowly. Tr. 534-535.

D. LOCK OUT PROTOCOL AT THE MILLVILLE FACILITY

The Respondent’s parent corporation, Lafarge Holcim, has a corporate-wide policy on “health and safety consequence management,” which is electronically provided to new Millville quarry employees. This policy identifies violations of the company’s lockout protocols as being in the more serious of two categories of misconduct and states that such a violation can “result in immediate disciplinary action up to, and including, separation of employment. R Exh. 4, Section 5.5. When triggered, the lock out protocol requires the employee to go to the breaker room, flip the breaker switch to cut off energy to the equipment being repaired, and then place their personal lock on the switch to secure it in the “off” position. Once this is done, any other employee who is engaged in the work must put their own separate lock on the breaker switch. Along with the locks, each employee places a tag on the switch that identifies them, and also warns that the corresponding equipment is not to be operated. This prevents the equipment from being re-started until every employee working on the equipment has removed his or her lock. In addition to locking the breaker, the employees are required to check that the equipment has, in fact, been de-energized and that there is no residual or stored energy flowing to it. They do this by asking the plant operator to attempt to run the equipment to confirm that it will not begin operating.

The orientation that the Respondent provides to new employees includes “two, three, four slides” on the lockout/tagout protocols. Tr. 898. The Respondent also provides annual refresher training that is required by the U.S. Mine Safety and Health Administration (MSHA). The refresher training lasts a full day, of which 30 minutes are scheduled for training on the lockout rule. In the 2019 annual refresher training, the Respondent highlighted the seriousness of failing to properly lockout equipment, noting that “LOTOTO exists to prevent injuries and fatalities from the unexpected start up or release of stored energy.” R Exh. 12. The Respondent also offers employees a self-administered online training program that covers many topics including topics relating to lockout protocols.

The written training materials and policies that were introduced into evidence at trial explain the lock out procedure, but do not state whether that procedure is

immediately triggered when safety guards are to be removed from around the tail pulley of a conveyor belt. However, witnesses for both the Respondent and the General Counsel testified that the Respondent trained employees that the lockout requirement was triggered as soon as an employee intended to remove a safety guard from a mechanism.¹² This was testified to by Harmon, Tr. 121-122, 127-128, Wright, Tr. 79-80, and Curtis Mills, Tr. 939. In addition, Molina and Alberto both testified that they were aware of this strict, bright line, version of the lockout rule, although they also testified that the Respondent did not follow it in practice at the Millville facility. Tr. 251-253, 598-600.

Despite the Respondent's official rule, there was credible evidence that, prior to the Molina incident, the Respondent did not discipline employees at the Millville facility for failing to lock out equipment before removing guards. Based on my review of the record and observation of the demeanor of the witnesses, I find that, prior to June 28, employees at the Millville facility, with the knowledge of their supervisors, removed guards and worked on equipment without locking out. Molina, Alberto, and Johns all testified that this was the case. Tr. 222, 229, 251-253, 292-294, 508, 513-514, 598-602, 620-621. Indeed, Molina and plant operator James Osborne both testified that Curtis Mills and other supervisors encouraged employees to skip lock out protocols because the supervisors were under pressure not to slow production. Tr. 204-205, 222, 225, 229, 430, 431, 455-457. Molina testified that Curtis Mills told him that "they keep pushing me to keep production going." Tr. 229-230.¹³

I recognize that Molina, Alberto, and Johns each had a personal stake in this proceeding. Nevertheless, I found that they testified in a confident and certain matter regarding the Respondent's pre-June 28 lockout practices at the Millville facility and also that their testimonies were mutually corroborative. However, my finding that they were credible on that score is also based on the corroboration provided by other testimony and evidence. Notably, Osborne, a plant operator who has been at the Millville facility since 1985, stated that during that time employees routinely bypassed

¹² There is also reference in the transcript to lockout procedures required by MSHA. The record does not clearly establish the parameters of the MSHA requirements, or whether they are co-extensive with the Respondent's own rule. There was some testimony that the MSHA rule did not require employees to lockout unless they "broke the plane" – meaning that they not only removed the guards but also put their hands within the guarded area. However, it was unclear from the record whether that applied to repairs to a tail pulley, or whether it was even the current rule in June 2019. Alberto remembered being trained that MSHA rules required employees to lockout before removing guards from a machine. Tr. 649-650.

¹³ Molina's supervisor, Curtis Mills, denied that he ever instructed employees to skip lockout protocols in the interests of higher productivity. Tr. 940. However, the documentary evidence shows that, consistent with Molina's testimony, the Respondent was "pushing [Curtis Mills] to keep production going." Specifically, the record contains an August 31, 2018, letter from the plant manager warning Curtis Mills that his shift had not been performing satisfactorily from the perspective of productivity and that "failure to meet these objectives will result in the separation of your employment." General Counsel's Exhibit Number (GC Exh.) 19. Osborne's supervisor was not called to address Osborne's testimony that the supervisor encouraged employees to skip lockout procedures in the interests of productivity.

the lockout protocol and that, to his knowledge, this had never once led to a Millville employee being disciplined in any way. I note that Osborne had a good vantage from which to testify about this practice both because, as plant operator, he was the one who employees would contact to “try out” the locked machinery, Tr. 394-395, and because from the elevated tower where his station was located he was able to see employees working on equipment. Tr. 456-457. Furthermore, Osborne was responsible for performing safety inspections by walking around the facility for 30 to 40 minutes on his shift. Tr. 422-423. Osborne also had hands-on experience with the Respondent’s handling of lockout protocols because he sometimes helped to track belts himself. Tr. 426, 447-448. Osborne credibly testified that on some occasions when he had worked on equipment without locking out a supervisor had directed him to lockout, but had never disciplined him having failed to do so already. Tr. 391-392. Osborne testified: “[B]efore [the incident with Molina], if a supervisor caught you with no lock on, he’d just tell you to go put a lock on and it was over with. That’s between you and the supervisor. . . . You know, there wasn’t nothing done about it.” Tr. 411-412. Osborne is a current employee who was not shown to have anything personally to gain from the outcome of this litigation.¹⁴

The testimonies of Osborne, Molina, Alberto and Johns that, prior to June 28, 2019, employees at the Millville facility were not disciplined for violating the lockout policy is also lent credence by the fact that the Respondent did not establish a single instance when, prior to discharging Molina, the Respondent had *ever* disciplined a Millville employee in *any* way for violating lockout procedures. To the contrary, the evidence established that the Respondent had not disciplined anyone at the Millville facility for such an offense for at least 8 years and Osborne testified that he had never heard of such discipline during his entire 30-plus-year tenure at the Millville facility.¹⁵ The Respondent would have me believe that the lack of any history of discipline for lockout violations at the Millville facility is not the result of a failure to enforce lockout rules there, but rather the result of the fact that no one ever violated the lockout protocols. This improbable claim is rebutted not only by the credible testimony of

¹⁴ I found Osborne to be a particularly credible witnesses based on his demeanor, apparent lack of bias, and the record as a whole, without regard to the fact that he was a current employee who was testifying against the interests of his employer. I note, however, that the Board has recognized that current employees who testify adversely to their employer’s interests may be judged particularly credible since by giving such testimony they expose themselves to the possibility of retaliation. See *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 8 fn.6 (2018), enfd. 765 Fed. Appx. 443 (D.C. Cir. 2019), *Portola Packaging, Inc.*, 361 NLRB 1316, 1316 fn.2 (2014), and *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996); see also *Challenge Manufacturing Company*, 368 NLRB No. 35, slip op. at 5 fn. 5 (2019) (witness’ status as a current employee is among the factors that a judge may utilize in resolving credibility issues) enfd. 815 Fed. Appx. 33 (6th Cir. 2020).

¹⁵ The record shows numerous examples at facilities other than Millville in which the Respondent decided to discipline an employee for violating the lockout protocol and in each such case the penalty was termination. Tr. 1091, R Exh. 104, GC Exh. 11. There was no examination of whether at other facilities, as at Millville, the Respondent had sometimes overlooked such violations such that they would not be noted at all in the records of disciplinary actions.

Osborne and others that prior to the Molina incident supervisors saw employees violating the lockout rule and did not discipline those employees, but also by the evidence that there was another violation of the rule just 3 weeks after the Molina incident. Specifically, Osborne observed an experienced, MSHA-trained, contractor violating the lock out rule on July 19, 2019. Tr. 403-406, 1049, 1164. Osborne communicated this observation to lead man C.W. Mills, but in this instance C.W. Mills was unconcerned about the violation. Tr. 404. After that, Osborne located a supervisor and informed him about the ongoing lockout violation and C.W. Mills' failure to address it. The Respondent subsequently concluded that the contractor had, in fact, violated the lockout rule, and reacted by permanently banning the contractor from the Respondent's facility.¹⁶ The record indicates that the contractor's lockout violation would have gone unpunished, as such violations had before Molina's case, if not for the fact that Osborne pressed the issue because he believed that the rule should be uniformly enforced.

It is surpassingly implausible that Millville workers had universally adhered to the lockout rule for decades but then, immediately following the successful union campaign, multiple experienced workers, including a non-bargaining unit contractor, violated that rule in two unrelated instances over the course of just 3 weeks. This implausibility is heightened when one considers that by doing so the workers were risking their own safety without anything obvious to gain for themselves. The level of implausibility reaches even greater heights when one considers that Molina was a 16-year veteran who had never previously been disciplined for safety or performance reasons. Tr. 178. How could an employee who was as reckless about a strict workplace rule as the Respondent now suggests Molina was create such a long and unblemished work record?

I carefully considered the testimony of Harmon, Wright, and Curtis Mills on the subject of the actual practice at the Millville facility and find that it is significantly outweighed by the evidence, discussed above, showing that violations of the lockout policy were tolerated at the Millville facility prior to June 28. On this point, I gave Harmon's testimony little weight since he had very limited opportunity to observe the actual practice there.¹⁷ He was not based at the Millville facility, but rather was responsible for overseeing 39 other facilities and only visited Millville about once a month. For his part, Wright, although a 21-year veteran in the mining industry, had only recently started working for the Respondent, and did not become plant manager at the Millville facility until 2 or 3 months before the June 28, 2019, incident. During his testimony about lockout protocols he repeatedly defaulted to basing his responses on how things were done "in the industry," Tr. 79, 89, 1129, 1163, 1178, 1194, 1195. I find that his pronouncements about the lockout protocols were based primarily on his years of experience with other employers in the mining industry, and not on conduct he witnessed during the few months that he worked at the Millville facility prior to the June 28 incident. Therefore, his testimony on this point is entitled to very limited weight.

¹⁶ In addition, the Respondent suspended C.W. Mills for 3-days because of his part in the incident.

¹⁷ I do find that Harmon was knowledgeable and credible regarding the safety training that was provided to Millville employees, since he provided and oversaw that training.

5 Curtis Mills testified that in his 35 years at the Millville plant he had never, prior to the incident with Molina, seen anyone work on a belt with the guards removed without locking out. Tr. 952-953, 960. This was contradicted by the testimony that Curtis Mills
 10 watched, and even encouraged, employees to do this and otherwise cut corners on safety in order to maintain production. As previously discussed, I found Curtis Mills a less than reliable witness both because he had a medical condition that he conceded could cause him to “just not remember things,” Tr. 962, and because he strained to exaggerate in ways favorable to the employer’s case. The record also demonstrates
 15 that Curtis Mills was hostile towards Molina in ways that buttress the view that he was inclined to strain to support the termination decision. As found earlier, Curtis Mills stated that he viewed Molina as a “troublemaker” who was behind the union campaign that Curtis Mills said might cause his own termination or demotion.¹⁸ Curtis Mills also knew that Molina had made complaints about him to Wright in the context of a discussion regarding the reasons for the union campaign. Tr. 194-195, 1180-1181. I find that Curtis Mills’ bias, demeanor, testimony, self-confessed memory problems, and the record as a whole, render his testimony unworthy of credence on the disputed question of how the lockout protocol worked in practice at the Millville facility.

¹⁸ Rutherford and Johns both testified that Curtis Mills told them that if the Union campaign was successful, he would be blamed and terminated or demoted. Tr. 309, 497. There is considerable evidence in the record showing that Curtis Mills’ situation at the Respondent was precarious during the time period surrounding the union election. On August 31, 2018, the Respondent placed him on a performance improvement plan (PIP) that cited concerns about a failure of his shift to meet productivity goals. GC Exh. 19. On April 8, 2019, the plant manager who preceded Wright submitted an update on Curtis Mills’ PIP status and stated that he had improved in some respects but “[t]hat does not say that we are out of the woods.” GC Exh. 23. Collins states that in May 2019 a decision was made to demote Curtis Mills, Tr. 742-745, but that the Respondent decided to put that on hold because of the change in management (Wright taking over as plant manager) and the unavailability of other supervisors. Tr. 744. She stated that Curtis Mills was aware that the decision to demote him had already been made prior to the Union filing the representation petition. Ibid. There is evidence, however, which indicates that the status of any decision to demote Curtis Mills was still fluid during the period surrounding the union election and the June 28 incident. For example, Harmon stated that Curtis Mills was on “kind of probation” as of June 28, Tr. 144-145, and that Curtis Mills was subsequently demoted in part because of the June 28 lockout incident and his failure to adequately supervise work that evening. Tr. 132. The Respondent, in the letter informing Curtis Mills of the reason for his demotion, cited his “lack of follow-through” regarding lockout as a basis for deciding to implement the demotion at that time. GC Exh. 24. The Respondent’s citation to the events of June 28 as a reason for the demotion suggests that its decision to demote Curtis Mills was not final prior to that time. Collins, while she indicated at one point that a final demotion decision had been made in April, at another point in her testimony described the situation in less definitive terms, stating that she told Curtis Mills that the Respondent “wanted him to consider possibly . . . stepping down from the role and looking at other positions.” Tr. 744. I find that, during the time period surrounding the representation election and the June 28 repair incident, Curtis Mills’ continued service in the supervisory position was still hanging in the balance.

E. RESPONDENT'S PRE-HEARING DISCUSSIONS WITH C.W. MILLS

5 C.W. Mills was called by the Respondent as a witness in this proceeding on
January 14, 2021. He was not a supervisor or manager, but has been a lead man with
the Respondent for 8 to 10 years, and is the son of Curtis Mills, a supervisor who the
complaint alleges committed violations of the Act. The Respondent's trial attorneys –
10 Terrence J. Miglio and Barbara Buchanan – and Lane met by teleconference with C.W.
Mills on two occasions in preparation for calling him as a witness.¹⁹ The first of these
meetings took place “around the beginning of December,” which was about 4 or 5
weeks before C.W. Mills was called to testify. The meeting lasted about 20 to 30
minutes. Miglio, Buchanan, and Lane met with C.W. Mills the second time the day
before he testified. This teleconference also lasted for about 25 to 30 minutes.

15 C.W. Mills testified that, during the meeting in December, “I mainly talked to just
Mr. Miglio.” At this meeting, C.W. Mills was told that he would be called to testify about
the lockout tagout issue on June 28. He was asked “vaguely maybe like [about] sides”
in the union campaign, “[I]ike who they thought like was Union sides or like Company
20 sides, or . . . who associate with who I guess, something like that maybe.” Tr. 773-774.
At trial, the General Counsel asked C.W. Mills whether, during that December meeting,
the Respondent's officials told him that if he chose not to participate in the meeting he
would not be retaliated against. C.W. Mills answered: “Not really. I mean it was one of
those things where like if they needed me to be in it, I have to be in it or I would get a
25 subpoena.” Tr. 774.²⁰ As best I can discern, based on his answer -- specifically his
reference to being subpoenaed – C.W. Mills understood the General Counsel's question
to relate to whether he was told his participation as a witness (i.e., the trial in this
matter) was voluntary, not about whether his participation in the pre-trial meeting was
voluntary. When the General Counsel asked whether they told him that he would not be
30 disciplined for what he said during that meeting, C.W. Mills testified, “Something like
that I guess. I don't know.” Tr. 775. He testified that he had no recollection of them
telling him that he would not be retaliated against if he decided not to participate, but
that they did say he did not “have anything to worry about” because he was “just telling
the truth.” Ibid.

35 The day before he testified, C.W. Mills' had another meeting, this one lasting 25
to 30 minutes, with Miglio, Buchanan, and Lane. They told him that he would be called
to testify about “what I saw and things like that.” At trial, the General Counsel asked

¹⁹ There was reference in the record to other pre-trial meetings between Lane and C.W. Mills without the participation of trial counsel.

²⁰ Three questions later, Counsel for the General Counsel asked C.W. Mills, “Did they tell you that you wouldn't be retaliated against or there would be no action taken against you if you decided not to participate.” Tr. 775. C.W. Mills answered, “No, I mean I don't remember that part.” Ibid. In this instance, I am unsure as to whether Curtis Mills was answering with respect to what he was told regarding his participation in the pre-trial meeting, or regarding his participation as a witness at the trial itself.

C.W. Mills whether the Respondent's officials once again questioned him "about Company side, Union side?" and C.W. Mills answered, "Yeah, just pretty much like who I thought was and what side." Tr. 776-777. At trial, Counsel for the General Counsel asked whether "At any point before the meeting, did they tell you that you didn't have to participate in the meeting if you didn't want to." C.W. Mills answered, "No, I mean if feel like they made it clear that I was going to have to be part of it or I was going to be subpoenaed." Tr. 777. Here too, it appears to me, based in good part on C.W. Mills' reference to the possibility of a subpoena, that he understood the question as relating to his participation as a witness at trial, not to his participation in the preparation for the trial. He testified that, during the meeting the day before he testified, they told him that "everything I'm saying, shouldn't affect me in any way." Tr. 777. He testified further that they told him "something similar" to "the Company wouldn't take any action against you for what you said in your testimony." Ibid.

Lane testified that he told C.W. Mills that his "role in this" was "voluntary," but, on the other hand, that he told C.W. Mills that "we need him to testify" and that "he could be subpoenaed by the NLRB or by the Company attorneys." 1100. Lane stated that he told C.W. Mills about the "nature of the hearing." Lane recounted that C.W. Mills was concerned whether "anything" could "happen" to him, and that Lane told him "absolutely not" and "there would be no negative consequences to him." Tr. 1100-1101. It was unclear whether Lane was testifying that he made these statements when he met with C.W. Mills alone, or whether he did so during the meetings with trial counsel, or whether he do so at all the meetings. Lane also testified that during one of the meetings in which Miglio and Buchanan participated, Buchanan told C.W. Mills there would be "no consequences to you for participation." Tr. 1101. During his testimony, Lane used the word "nervous" four times to describe C.W. Mills' demeanor during these conversations, but said that C.W. Mills "seemed willing" to testify, Tr. 1100, and did not indicate that he "was unwilling to go forward and testify," Tr. 1102.

ANALYSIS AND DISCUSSION

I. SECTION 8(A)(1) ALLEGATIONS

A. IMPRESSION OF SURVEILLANCE

As set forth above, during the period leading up to the June 27 representation election, Curtis Mills told employees on the 2nd shift that he, and the office, knew the 2nd shift employees were the "troublemakers" behind the prounion campaign. The General Counsel alleges that these remarks violated Section 8(a)(1) of the Act because they created the impression that the union activities of employees at the Millville facility were under surveillance by the Respondent. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their rights to engage in protected union and concerted activity. "When an employer creates the impression among its employees that it is watching or spying on their union activities, employees' future union activities, their future exercise of Section 7 rights, tend to be inhibited." *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539-40 (2000). Therefore, an employer violates Section 8(a)(1) by creating such an

impression. Ibid. The employer's conduct is evaluated from the perspective of the employees and is unlawful if the employees would reasonably conclude from the statement in question that their protected activities were being monitored, regardless of the Respondent's motivation or whether the statement did, or did not, chill the exercise of Section 7 rights. *Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006); *Robert F. Kennedy Medical Center*, 332 NLRB at 1540; *Fred'k Wallace & Son, Inc.*, 331 NLRB 914, 914 (2000); *Tres Estrellas de Oro*, 329 NLRB 50, 50-51 (1999).

Based on the record evidence in this case, I conclude that Curtis Mills created the impression that employees' union activities were being monitored when he told them that the Respondent knew the 2nd shift employees were the "troublemakers" behind the union campaign. *George L. Mee Memorial Hospital*, 348 NLRB 327, 342-343 (2006) (From employer's comments that employee was a "ringleader," it was reasonable to conclude that employees' union activities were under surveillance."). "When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1)." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1296 (2009), *affd.* in relevant part by 357 NLRB 633 (2011), *enfd.* 498 Fed. Appx. 45 (D.C. Cir. 2012). In this case, in particular, it would be reasonable for the 2nd shift employees to conclude from Curtis Mills' remarks that their union activities had been placed under surveillance since they were holding their union meetings off-site and a number of the 2nd shift employees to whom the remarks were made had been circumspect about revealing their views. Johns was careful about who he told he supported the Union and even when co-workers expressed views about the Union in his presence he would not reveal his own preferences, but rather just go along with "how they were talking." Alberto, too, was not open about his union views and when the Respondent's officials discussed the Union with him, Alberto would either decline to reveal his position or, according to both Lane and Wright, actually indicate that he opposed unionizing. Under these circumstances, Curtis Mills, by telling 2nd shift employees that the Respondent knew they were behind the union campaign, created the impression that the Respondent was watching or spying on union activities at the facility. By creating such an impression, the Respondent tended to unlawfully inhibit future union activity in violation of Section 8(a)(1) of the Act. *Robert F. Kennedy Medical Center*, *supra*; see also *Flexsteel Industries, Inc.*, 311 NLRB 257, 257 (1993) ("employees should feel free to participate in union activity without the fear that members of management are peering over their shoulders").

For reasons set forth above, I find that in June 2019 the Respondent violated Section 8(a)(1) of the Act when Curtis Mills made statements to employees that gave the impression that their union activities were under surveillance by the Respondent.

B. THREAT OF UNSPECIFIED REPRISALS

The General Counsel also alleges that Curtis Mills made statements that constitute threats of unspecified reprisals in violation of Section 8(a)(1) of the Act. This allegation, like the one regarding the impression of surveillance, is analyzed using the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark,

or rely on the success or failure of such coercion. *Divi Carina Bay Resort*, 356 NLRB 316, 319 (2010), enfd. 451 Fed. Appx. 143 (3rd Cir. 2011); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). The Board considers the totality of the relevant circumstances when applying this standard. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

In this case, the evidence showed that Curtis Mills told 2nd shift employees that the Respondent knew they were the “troublemakers” behind the union campaign and that he “only had be nice for one more week.”²¹ I conclude that these statements would reasonably be understood by employees as a threat of unspecified reprisals. Telling employees that the Respondent has identified them as “troublemakers” because of their support for the Union, standing alone, communicates that the employer considers them undesirable employees because they exercised their statutorily protected rights. Under similar circumstances the Board, in *Corliss Resources, Inc.*, 362 NLRB 195, 195-196 (2015), found a violation. There the Board held that a supervisor’s reference, inter alia, to employees who supported the union as “backstabbers” . . . would reasonably have been understood to characterize all supporters of the Union as disloyal and to threaten them with retaliation.” Ibid. Finding a violation is further warranted given Curtis Mills’ statement, during a discussion with Rutherford regarding the Union, that in one week (i.e., immediately after the representation election) he would not have to be “nice” to employees anymore. The communication that he will be freed to be *not nice* to employees after the election would reasonably suggest to the employees that the activities of so-called troublemakers were taking place under the cloud of possible future retribution.²² A reasonable employee would see this remark as a threat especially since, immediately after the election, Curtis Mills instigated the investigation that led to “troublemaker” Molina being terminated after 16 years of virtually unblemished performance as an employee.

For reasons set forth above, I find that in June 2019 the Respondent violated Section 8(a)(1) of the Act when Curtis Mills threatened employees with unspecified reprisals because of their protected union support and/or activities.

²¹ The General Counsel also relies on Curtis Mills’ alleged remark that the employees had to “watch out.” For the reasons discussed in the findings of fact, I find that the evidence does not substantiate that this additional remark was made.

²² Curtis Mills conceded that he may have told employees that he only had to be nice to them for one more week, but he asserted that the statement would have been motivated by his knowledge that he would be demoted from his supervisory position following the representation election. This purported motive is irrelevant since the Board’s objective test does not consider the motivation for a remark when considering whether employees would reasonably consider it threatening. *Crown Stationers*, 272 NLRB 164, 164 (1984); see also *Divi Carina Bay Resort*, supra; *Joy Recovery*, supra; *Miami Systems*, supra. Moreover, in this case Curtis Mills said nothing at the time of the facially threatening statement that tied that statement to his putative benign motive.

C. INTERROGATIONS

The General Counsel also alleges that, during Bottom's one-on-one meetings with employees in the days leading up to the representation election, he interrogated employees in a manner that violated Section 8(a)(1) of the Act. An employer unlawfully interrogates employees if, in light of the totality of the circumstances, the questioning would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 30 (2016), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017); *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-293 (1990). Factors the Board has recognized as bearing on the question of whether an interrogation is unlawful include: whether the interrogated employee was an open or active union supporter; whether proper assurances were given concerning the questioning; the background and timing of the interrogation; the nature of the information sought; the identity of the questioner; and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177-1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). When an employee responds to questioning by attempting to conceal union support, that tends to indicate that the questioning was unlawfully coercive. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182-1183 (2011), citing *Sproule Construction Co.*, 350 NLRB 774, 774 fn.2 (2007).

In support of this allegation, the General Counsel points to the one-on-one meetings that Bottom conducted with Johns, Alberto, and Molina during the days immediately before the representation election. I find that under the standards set forth above, the record establishes that Bottom's questioning of employees coerced them in violation of the Act. With respect to Johns in particular, I believe the relevant factors weigh heavily in favor of finding a violation. Johns was a relatively new, hourly, employee who was only 18 years old and working his first job at the time of the interview. Bottom, on the other hand, was a regional level official with management responsibilities over 40 facilities. He was seen at the Millville facility very rarely. Bottom conducted the interview with Johns by entering the vehicle that Johns was operating at work, and then riding alone with Johns for a period of at least 15 minutes and possibly as long as 1 ½ hours. Thus, Bottom both isolated Johns from other employees and created a situation from which Johns could not easily excuse himself. Johns was not open about his views regarding unionization, but rather had been very guarded on the subject. Among the things that Bottom asked Johns during this period was how he "felt about the union." The Board has held that an employer engages in an unlawful interrogation when, as here, during a one-on-one conversation, the employer asks questions that probe into an employee's union sentiments. See *Morgan Services*, 284 NLRB 862, 868 (1987). A young, entry-level, employee like Johns, who was not an open union supporter, would reasonably find it coercive and intimidating to be trapped, isolated from others, for an extended period of time with an unfamiliar, upper level, management official who was probing his union views in order to encourage a vote against unionization. The Respondent has not shown that Bottom mitigated the coercive nature of this questioning by assuring Johns that the purpose of the inquiry

was benign and that his responses would not be held against him in any way. The Board has repeatedly noted that an employer's failure to provide such assurances when questioning employees about their protected activities weighs in favor of finding such questioning unlawfully coercive. *North Memorial*, 364 NLRB No. 61, slip op. at 30; *Stoody Co.*, 320 NLRB at 18-19; *Rossmore House Hotel*, 269 NLRB at 1177-1178.

Bottom's coercive questioning of Johns is sufficient to establish the interrogation violation. However, added support for finding such a violation is provided by Bottom's questioning of Alberto. Alberto was not open about his support for the Union, and in fact was believed by Rutherford and others at the facility to be opposed to unionizing. Bottom approached Alberto to talk about the Union at least twice, including once just a few days before the election. During the last of these one-on-one meetings, Bottom asked Alberto how he intended to vote in the upcoming election. The privacy of employee's vote in a representation election is entitled to a high level of protection, and an employer violates the Act by asking questions about how an employee intends to vote. *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 1 (2017), enfd. 916 F.3d 1095 (D.C. Cir. 2019); see also *Royal Laundry*, 277 NLRB 820, 830 (1985) ("The Board jealously guards the secrecy of the voting booth. How an employee votes, or intends to vote, is a prohibited subject for interrogation by an employee's employer – even when done . . . by a low level supervisor.").

For the reasons discussed above, I find that in June 2019 the Respondent, by Bottom, interrogated employees at the Millville facility about their union sympathies and how they intended to vote in the upcoming representation election in violation of Section 8(a)(1).

D. JOHNNIE'S POULTRY ALLEGATION

The complaint alleges that when the Respondent's agents interviewed employees on about June 12, 2021, to prepare for the trial in this matter they improperly questioned employees about the union membership, activities and sympathies of themselves and or employees. The General Counsel contends that the questioning of C.W. Mills was improper because the Respondent failed to comply with the minimum safeguards and assurances set forth by the Board in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enfd. denied 344 F.2d 617 (8th Cir. 1965). In *Johnnie's Poultry*, the Board stated that when an employer interrogates an employee to investigate facts necessary to prepare for the employer's defense regarding issues raised in an unfair labor practices complaint, the employer must comply with the following "specific safeguards designed to minimize the coercive impact of such employer interrogation."

[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting

information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Ibid.; see also *Lamar Advertising Hartford*, 343 NLRB 261, 262 fn.8 (2004) (same).

5 Compliance with the “*Johnnie’s Poultry*” safeguards constitutes the minimum required to dispel the potential for coercion in cases where an employer questions employees in preparing for a Board hearing.” *Tschiggfrie Properties*, 365 NLRB No. 34, slip op. at 2 (2017), quoting *Albertson’s, LLC*, 359 NLRB 1341, 1343 (2013), *affd.* 361 NLRB 761 (2014). The Board has held that if the employer provides the *Johnnie’s Poultry* 10 assurances during one of multiple interviews with the same employee, it still must provide the assurances in other interviews unless the various interviews were close in time and encompassed the same subject matter. *Albertson’s*, *supra*. The employer’s agents are not relieved of the obligation to abide by these minimum safeguards even if they perceive the employee being interrogated as favorably disposed to the employer’s 15 point of view. *Albertson’s*, 359 NLRB at 1343-1344.

Unfortunately, much of the evidentiary record relevant to whether or not the Respondent complied with the above safeguards is not well-developed. There were multiple pre-trial meetings, some involving Lane along with the Respondent’s trial 20 counsel, and some involving just Lane, and much of the relevant testimony was vague as to which pre-trial meeting, or meetings, the testimony related. In addition, the testimony that the Respondent told C.W. Mills that his participation was not voluntary does not seem to relate to his participation in the *Johnnie’s Poultry* pre-trial preparation, but rather to his participation as a witness in the trial itself.²³ For these reasons, I find 25 that the General Counsel has not shown that the Respondent failed to meet its obligations in certain regards – for example, with respect to whether the Respondent explained the purpose of the questioning to C.W. Mills, obtained his participation in the pre-trial meeting on a voluntary basis, and assured him that no reprisals would take place. 30

I do find, however, that the record establishes that the Respondent violated the *Johnnie’s Poultry* standard because it exceeded the “necessities” of preparation for the hearing by “prying into other union matters.” 146 NLRB at 775. Specifically, C.W. Mills gave uncontradicted testimony that during both of the two pre-trial meetings with the Respondent’s counsel, he was asked about which employees supported the Union. 35 C.W. Mills testified that during the first of those meetings the Respondent also asked “who” “associate[d] with who” with respect to the union activity. I recognize that in a case alleging discriminatory discipline the Respondent’s knowledge of the union support or activities of alleged discriminatees is relevant. However, C.W. Mills testified that he 40 was questioned about the union sympathies and associations of employees, not that he was questioned only about the alleged discriminatees. General questions about the

²³ The General Counsel does not appear to contend, or cite authority suggesting, that it would be unlawful for an employer to subpoena a current employee who refuses to testify voluntarily. See, however, *Santa Barbara News-Press*, 361 NLRB 903, fn.1 (2014), *enfd.* 2017 WL 1314946 (D.C. Cir. 2017) (impermissible for employer to subpoena employees in order to obtain their confidential Board affidavits).

union proclivities and associations of employees “exceed the necessities of the legitimate purpose by prying into other union matters.” *Johnnie’s Poultry*, supra. Finally, I note that according to C.W. Mills the December interrogation was conducted by Miglio and, while there was testimony that Lane and attorney Buchanan gave certain assurances to C.W. Mills, there was no testimony that Miglio gave C.W. Mills any of the required assurances at the time he interrogated him. See *Albertson’s*, supra (even if an employer provides the necessary assurances during one of multiple meetings, the employer is not necessarily absolved of providing those assurances during other meetings). Thus, to whatever extent such assurances from Miglio at the time of the questioning might have mitigated the otherwise coercive character of the questions about co-workers’ union sentiments and associations, the record did not show that such mitigating circumstances were present.

I find that the Respondent violated Section 8(a)(1) of the Act by failing to provide the required minimum safeguards when it questioned employee C.W. Mills in preparation for the trial in this proceeding.

II. SECTION 8(A)(3) ALLEGATIONS

A. TERMINATION OF MOLINA

The complaint alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act by terminating Molina on July 12, 2019, because he assisted the Union and engaged in concerted activities. Under the Board’s *Wright Line* decision, the General Counsel bears the initial burden of showing that the termination was motivated, at least in part, by activities protected by the Act. 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (Section 8(a)(3) and (1)). The General Counsel may meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or other protected activity, and there was a causal connection between the discipline and the protected activity. *General Motors LLC*, 369 NLRB No. 127, slip op. at 10 (2020); *Camaco Lorain Mfg. Plant*, 356 NLRB at 1184-1185; *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000). Animus may be inferred from the record as a whole, including timing and the employer’s resort to shifting explanations. See *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 16 and *Camaco Lorain* supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *General Motors*, supra; *Camaco Lorain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

The General Counsel easily establishes the elements of its prima facie case with respect to Molina. Molina led the employees’ effort to unionize and engaged in a range of visible prounion activities. These prounion activities included distributing union

authorization cards and union literature, collecting the majority of the signed union cards, and serving as one of two designated union election observers. The Respondent knew that Molina engaged in activities in support of the Union. During the lead up to the election, Curtis Mills told Rutherford that the rumor was that Molina was the

5 “troublemaker” who was trying to bring the Union in. Of all the employees who Bottom questioned as part of the antiunion campaign, Molina was the only one who answered that he would vote in favor of the Union. On the day before the election, Molina told a group that included Lane and Curtis Mills that he would be a union election observer. That day, Molina also told Wright that he would be a union observer during the election.

10 The General Counsel has also met the third, and final, element of its initial burden, by showing that antiunion animus was connected to Molina’s termination. Curtis Mills referred to Molina as the “troublemaker” behind the union effort. Curtis Mills’ characterization of an employee as a “troublemaker” for engaging in activity protected

15 by the Act is evidence of animosity towards that activity. Curtis Mills also told employees that if the Union prevailed in the election he would be fired or demoted because the Respondent would blame him. Indeed, Curtis Mills knew that Molina had indicated to plant manager Wright that Curtis Mills’ shortcomings as a supervisor were one of the motivations for union support. Curtis Mills’ hostility towards union activity is

20 further supported by his unlawfully coercive response to the union campaign. As discussed above, he created the impression that the Respondent had placed union activities under surveillance and he threatened employees with unspecified reprisals. Curtis Mills’ antiunion animus was connected to the alleged discrimination since he was the supervisor who triggered the disciplinary process by gathering evidence against

25 Molina and submitting it to Wright.²⁴ Moreover, the evidence showed that Curtis Mills did this even though in the past he had tolerated, and even encouraged, employees bypassing the same lockout rules.

30 The timing of Molina’s termination further supports a finding that antiunion animus was connected to the discipline. *Novato Healthcare Center*, 365 NLRB No. 137, slip op. at 16 (timing of adverse action relative to known union activity can be evidence of unlawful motivation); *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 31 (same); *Camaco*, 356 NLRB at 1185; *Gaetano & Associates*, 344 NLRB 531, 532 (2005) (same), enfd. 183 Fed. App. 17 (2d Cir. 2006), *Davey Roofing, Inc.*, 341 NLRB

35 222, 223 (2004) (same). During Molina’s entire 16-year history at the Millville facility, he had received only one prior disciplinary write-up – and that was approximately 10 years earlier for conduct that had nothing to do with safety or work performance. Then, just two days after Molina led the prounion campaign to a successful conclusion, the Respondent suspended Molina to investigate the event for which it ultimately terminated

40 him. The evidence discussed in the prior paragraph would be more than sufficient on its own to find that antiunion animus was connected to Molina’s termination. The timing of the termination, however, provides powerful further evidence in support of that finding.

²⁴ The evidence shows that Curtis Mills collected this photographic evidence before Wright directed him to document the violation.

Since the General Counsel has met its initial burden, the burden shifts to the Respondent to show that it would have terminated Molina even absent the anti-union motivation. *General Motors*, supra; *Camaco Lorain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. I find that the Respondent has failed to meet its responsive burden. The rationale that the Respondent gives for terminating Molina was that he violated the company's safety rules by removing safety guards from the tail pulley of a conveyor belt without first following the lockout procedure. The Respondent has succeeded in establishing some facts that support this rationale. Specifically, the Respondent showed that, after an investigation, it determined that Molina had, in fact, worked on the tail pulley of a belt with the guards removed without first locking out the belt. In addition, witnesses for both the General Counsel and the Respondent confirmed, and I find, that the Respondent had told Molina and other employees that it was a violation of the Respondent's safety protocols to remove the guards from a conveyor belt without first locking out the belt. The record showed, in addition, that the Respondent consistently terminated employees who were disciplined for lockout violations at other facilities. All of that, however, only goes to show that, prior to terminating Molina, supervisors and managers at the Millville facility were probably supposed to discipline employees who violated the lockout rules, not that they were in fact doing so. To the contrary, as set forth in the findings of fact, the record establishes that, prior to terminating Molina, the Respondent had *not* been disciplining employees at the Millville facility who violated the lockout protocols. Rather supervisory staff had knowingly allowed employees to bypass those rules, and when supervisors did conclude that an employee needed to lockout, but had not done so, the supervisors would simply advise the employee to lockout and not impose discipline of any kind. Indeed, there was credible evidence that supervisors at the Millville facility sometimes encouraged employees to cut corners with respect to lockout procedures in the interests of meeting production goals. Curtis Mills in particular had done this, which is not entirely surprising given that the PIP he was subject to in 2018 and 2019 warned that unless he could "drive" his shift to increase production it would "result in the separation of your employment." The Respondent was unable to identify a single case in its entire history when it disciplined any employee based on a lockout violation at the Millville facility. Indeed, plant operator Osborne credibly testified that to his knowledge the Respondent had never done so during his 30 plus years at the Millville facility and despite the fact that supervisors were aware that employees were bypassing lockout protocols. To sum up, the evidence shows that immediately after employees voted to unionize, the Respondent terminated Molina, the leader of the employees' unionizing effort, for making a repair the same way he and others at the Millville facility had been doing for many years with supervisors' knowledge and tacit approval.²⁵ Given this, the

²⁵ In the Respondent's brief, counsel also suggests that the Respondent would have discharged Molina for lying when the Respondent interviewed him as part of its investigation of the July 28 repair. Counsel's argument is not factually supported. First, the record does not show that the Respondent made a determination that Molina lied during those interviews. Indeed, the Respondent's termination letter to Molina does not cite dishonesty as a basis for the decision even though it does cite dishonesty as a basis in the termination letter issued to Johns on the same day. None of the officials on the corporate review team that made the discharge decision testified that the team had made a determination that Molina gave knowingly false

Respondent has failed to show that it would have terminated Molina even absent his union activity.

For purposes of deciding whether Molina's termination violated the Act, I assume without deciding that, unlike Curtis Mills, the higher level officials who subsequently participated in the termination decision (e.g., Wright, Harmon, Collins and Lane) were not themselves shown to have been motivated by antiunion animus. It is not necessary to reach that question²⁶ since Curtis Mills was a supervisor whose antiunion animus caused the termination decision. The United States Supreme Court discussed such cases in *Staub v. Proctor*, 562 U.S. 411, 422-423 (2011), and stated that an employer is liable for employment discrimination where one of its supervisors "performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and that act is the proximate cause of the ultimate employment action." *Jeff MacTaggart Masonary, LLC*, 363 NLRB No. 149, slip op. at page 2 fn.3 (2016) (citing *Staub v. Proctor* in discussion of Member Miscimarra's concurrence). That is the case here. As discussed above, Curtis Mills was motivated by antiunion animus when, on the day after the Union's election victory, he collected evidence against union leader Molina, and reported him for a terminable safety violation, even though Molina was doing the work the same way that Curtis Mills knew employees at the Millville facility had been doing it for years without consequence. Curtis Mills' unlawfully motivated actions were the proximate cause of Molina's termination as is demonstrated by, inter alia, the fact that his report set in motion the disciplinary machinery that, in the absence of such a report, had previously been quiescent with respect to employees at the Millville facility who violated the same safety rule as Molina. It was Curtis Mills' unlawfully motivated action, taken within the scope of his own employment, that proximately caused the different treatment of Molina. This

answers much less that, if they had made such a determination, it would have led to Molina's discharge. Indeed, the fact that the Respondent raises this additional explanation for Molina's discharge at the time of trial, if anything, arguably provides a bit of additional support for finding its *Wright Line* defense pretextual. See *Lucky Cab Co.*, 360 NLRB 271, 274 and fn.12 (2014) ("raising additional allegations of misconduct for the first time at the hearing supports finding of pretext"); *Inter-Disciplinary Advantage Inc.*, 349 NLRB 480, 509 (2007) (same); see also *Novato Healthcare Center*, supra (resort to shifting explanations for adverse action is evidence of unlawful motive), *Camaco Lorain*, 356 NLRB at 1185 (same).

²⁶ Although some of these officials had directed, or participated in, the Respondent's antiunion campaign, they were not alleged to have done so in ways that violated the Act. The Board recently departed from its prior practice of relying on an employer's expressions of opposition to unionization as evidence of antiunion animus where such expressions were not themselves found to be unlawful. See *United Site Services of California*, 369 NLRB No. 137, slip op. at page 14 fn. 68 (2020). I note, nevertheless, that there is other evidence that would tend to support a finding that antiunion animus played a part in the decisionmakers' actions regarding Molina. The timing of the discharge, as discussed above, is exceptionally suspicious. In addition, none of the decisionmaking officials were able to identify a single prior instance when they disciplined, much less terminated, an employee at the Millville facility for a lockout violation. Yet they proceeded to not only discipline, but terminate, the lead union organizer – an employee with an exemplary 16-year work history – for a lockout violation occurring 1 day after the success of that organizing effort.

“cat’s paw” analysis is particularly apt in the instant case since Curtis Mills was a supervisor with decades of experience at the Millville facility whereas Wright (the manager to whom he provided the photographic evidence and report) was a recent hire who had only been plant manager for 2 or 3 months. Under the Supreme Court’s *Staub v. Proctor* analysis, in this case, “the discriminatory animus of the supervisor who influenced, but did not make, the ultimate employment decision [is] deemed a motivating factor in the employer’s action.” *Jeff MacTaggart Masonry*, supra.

I find that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act on July 12, 2019, when it terminated Molina’s employment.

B. TERMINATIONS OF ALBERTO AND JOHNS

The General Counsel also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act when it terminated Alberto and Johns based on their involvement in the same June 28 belt repair that the Respondent relied on as the basis for discharging Molina. I find that the record and relevant caselaw support finding that the terminations of Alberto and Johns also violated the Act. I reach this conclusion despite the fact that, as discussed in the statement of facts, the record does not establish that the Respondent was aware of union activity or support on the part of either Alberto or Johns. Since such awareness is the second element of the General Counsel’s initial *Wright Line* showing, a violation is not established under the garden variety application of that framework. The General Counsel persuasively contends, however, that a violation is established under the analysis that applies “[w]here an employer takes an adverse action against an employee who is not a union supporter because the employer could not otherwise justify taking the same action against a union supporter.” *Corliss Resources, Inc.*, 362 NLRB at 197-198 and fn. 16, citing *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986); see also *Novato*, 365 NLRB No. 137, slip op. at 18. The Board has held that, in that circumstance, the employee who was not a known union supporter is “being used as a ‘pawn in an unlawful design’ and the actions against both employees are unlawful.” *Corliss*, supra. The Board has repeatedly recognized that employees who are not known union supporters, or even are known to be antiunion, can be swept up in adverse actions motivated by antiunion animus. *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 451 (1996), enfd. 135 F.3d 1 (1st Cir. 1997); *Weldun International*, 321 NLRB 733, 734 (1996); *Davis Supermarkets*, 306 NLRB 426 (1992), affd. and remanded 2 F.3d 1162, 1168 (D.C. Cir. 1993); *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991), enfd. in part 980 F.2d 1027 (5th Cir. 1993); *ACTIV Industries*, 277 NLRB 356 fn.3 (1985); *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); *Richardson Paint Company*, 226 NLRB 673, 673-674 (1976), enf. denied in relevant part 574 F.2d 1195 (5th Cir. 1978). In such circumstances the employer violates the Act by taking adverse action against the employee-pawns who were swept up in the unlawful plan, even when they are not known union supporters themselves.

Like the employees in the cases cited above, Alberto and Johns were pawns swept up in an action that was caused by the unlawfully motivated action against Molina. This is particularly evident in the case of Alberto. Curtis Mills was the one who

assigned the belt repair work to Molina and Alberto and oversaw their progress. Nevertheless, Curtis Mills did not reveal Alberto's involvement when he reported the infraction to Wright. As a result, Alberto was initially spared when Molina was suspended. The only reason that Alberto did not escape discipline was that employees raised Alberto's participation in the repair (and the disparately favorable treatment he initially received) during the investigation, and therefore the Respondent was constrained to subject Alberto to the same scrutiny as Molina. Similarly, Johns was swept up in the unlawful action against Molina because, although he only pitched in for a few minutes, he appeared beside Molina in the photograph that Curtis Mills took of the repair. Where, as here, other employees are swept up as pawns in an unlawful design against a known union supporter, the employer's actions against both the known union supporter and the "pawn[s] . . . are unlawful." *Corliss*, supra.

The Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when, on July 12, 2019, it terminated Alberto's and Johns' employment.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act at its Millville facility: in June 2019, when, by Curtis Mills, it made statements to employees that created the impression that employees' union activities were under surveillance by the Respondent; in June 2019, when, by Curtis Mills, it threatened employees with unspecified reprisals because of employees' protected union support and/or activities; in June 2019, when, by James Bottom, it interrogated employees about their union sympathies and/or how they intended to vote in the upcoming representation election; by failing to provide the required minimum safeguards when it questioned employee C.W. Mills in preparation for the trial in this unfair labor practices proceeding.

4. The Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act on July 12, 2019, when it terminated the employment of Jose Molina, Moris Alberto, and Thomas Johns.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Among the later, the Respondent must make Jose Molina, Moris Alberto, and Thomas Johns, whole for any loss of earnings and other benefits incurred as a result of their unlawful terminations. Backpay shall be

computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate the employees for their reasonable search-for work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally the Respondent shall compensate Molina, Alberto, and Johns for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director for Region 5 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.²⁷

ORDER

The Respondent, Bardon, Inc., d/b/a Aggregate Industries, its officers, agents, successors, and assigns to:

1. Cease and desist from

(a) Making statements to employees that create the impression that employees' union activities and/or other protected activities are under surveillance.

(b) Threatening employees with unspecified reprisals because of their union support and/or activities.

²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Interrogating employees about their union membership, activities, and sympathies, and/or about the union membership, activities, and sympathies of other employees.

(d) Interrogating employees about matters that are the subject of an unfair labor practice proceeding without providing the required minimum assurances and safeguards.

(e) Discharging employees because of their union sympathies and activities on behalf of a union, and/or other protected activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's order, offer Jose Molina, Moris Alberto, and Thomas Johns full reinstatement to their former jobs, or if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Molina, Moris Alberto, and Thomas Johns whole for any loss of earnings and other benefits suffered, and search-for-work and interim employment expenses incurred, as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Jose Molina, Moris Alberto, and Thomas Johns for the adverse tax consequences, if any, of receiving lump-sum backpay awards

(d) Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 5 a report allocating the backpay award to the appropriate calendar years for each affected employee.

(e) File with the Regional Director for Region 5 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(f) Expunge from its files all references to the unlawful discipline against Jose Molina, Moris Alberto, and Thomas Johns, and notify them in writing that this has been done and that the discipline will not be used against them in any way.

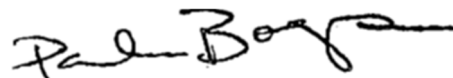
(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an

electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Millville, West Virginia, copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 5, 2019.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 2, 2021



PAUL BOGAS
U.S. Administrative Law Judge

²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT make statements to you creating the impression that we have placed your union activities under surveillance.

WE WILL NOT refer to employees as “troublemakers” because they engage in activities in support of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT threaten you with unspecified reprisals for engaging in activities in support of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT ask you about your union activities and sympathies, or the union activities and sympathies of other employees.

WE WILL NOT interrogate you about matters that are the subject of an unfair labor practices proceeding without providing you with the required minimum assurances and safeguards.

WE WILL NOT terminate or otherwise discipline you because of your membership in, support of, or activities on behalf of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, CLC, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jose Molina, Moris Alberto, and Thomas Johns full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL expunge from our files all references to the unlawful discipline against Jose Molina, Moris Alberto, and Thomas Johns, and notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL make whole Jose Molina, Moris Alberto, and Thomas Johns for the loss of earnings and other benefits they suffered as a result of our decision to suspend and terminate them, and WE WILL make them whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Jose Molina, Moris Alberto, and Thomas Johns for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

WE WILL file with the Regional Director for Region 5, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected employee.

WE WILL file with the Regional Director for Region 5 a copy of each affected employee's corresponding W-2 form(s) reflecting the backpay award.

BARDON, INC., D/B/A AGGREGATE INDUSTRIES

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov
Bank of America, Tower II, 100 S. Charles Street, Suite 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/05-CA-248026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (410) 962-2880.